Supreme Court, U.S
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

W.B. YORK, PETITIONER,

v.

DERONN WRATHER, STEPHEN WILLIAMS AND VINCENT TURNER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LARRY V. SIMMONS
Deputy City Attorney
Counsel of Record
JOHN E. DORMAN
Senior Assistant City Attorney

Legal Department
City of Tulsa
200 Civic Center, Third Floor
Tulsa, Oklahoma 74103
(918) 596-7717

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QUESTIONS PRESENTED

1. Whether, a public official asserting the defense of qualified immunity in a 42 U.S.C. § 1983 case is entitled to summary judgment when the record shows the official was exercising the discretionary duties of his office but the record remains unclear as to whether the official acted reasonably or not and this question arises from a lack of evidence rather than conflicting evidence presented by the plaintiff.

2. Whether a court improperly applies the doctrine of *respondeat superior* in a 42 U.S.C. § 1983 case when it denies qualified immunity to a public official and places the burden upon the official to come forward with evidence demonstrating that he should not be held liable for the actions of his subordinates.

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Constitution and Statutes:

U.S. Const. Amend. I 1,2
28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 6,7,9

Miscellaneous:

Prosser and Keeton On the Law of Torts, § 70
(5th ed. 1984) 9

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PETITION FOR A WRIT OF CERTIORARI

W. B. York petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, 1a-6a) and the district court (App. B, *infra*, 7a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

STATEMENT

1. Respondents Deronn Wrather, Stephen Williams, and Vincent Turner brought the present action for violation of constitutional rights against Petitioner Major W.B. York, Tulsa Police Department, and numerous other defendants, including the City of Tulsa, following their arrest after a Ku Klux Klan (KKK) rally held in Tulsa, Oklahoma. The material facts pertaining to Petitioner are not disputed.

On May 4, 1996, members of the Ku Klux Klan (KKK) held a rally on the public square located at the north side of the Tulsa County Courthouse. After the rally ended, approximately sixty (60) anti-KKK protestors gathered on the street near the south side of the courthouse building. The group appeared to be waiting for the KKK to leave the courthouse area. (App. A., *infra*, 2a; ER[1] at 00001-00003).

A short time later, Tulsa Police Department office observed KKK sympathizers nearby. Lt. Karen Rovan

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[1] "ER" refers to excerpts of the district court record that were filed with the Tenth Circuit. This was referred to as the Appellant's Appendix Volume 1 in the Tenth Circuit.

assigned officers to escort these people from the area. (App.B, *infra*, 12a-13a).

At about this same time, Sgt. Jim Clark, observed several people in the street striking and kicking passing cars. Sgt. Clark and Sgt. Charles Jordan advised Lt. Rovan and Petitioner of the situation. Petitioner was not present at the scene; he was stationed at a temporary command post located at least a block away from where the protesters and crowd had gathered. Based upon information provided by Sgt. Clark and Sgt. Jordan, Petitioner agreed with the decision to clear the street and move the crowd onto the adjoining sidewalk, so that any remaining KKK sympathizers could leave the area. (App.B, *infra*, 11a-13a; ER at 00031, 00052-00053, Plaintiff' s Response, p. 10).

According to accounts provided by officers at the scene, when the crowd was instructed to move out of the street, many persons become agitated. Several individuals refused to move. Some threatened the officers with violence. In response, a group of officers formed a skirmish line and began moving the crowd out of the street and onto the sidewalk. The situation deteriorated to the point that it became necessary to bring in mounted officers. (App.B, *infra*, 12a-13a). Several arrests were made. Respondent Vincent Turner was arrested for disorderly conduct after he challenged officers to remove him. Respondent Deronn Wrather was arrested for physically interfering with the arrest of Vincent Turner and assaulting a police officer. Respondent Steven Williams was arrested after he attacked officers while they were trying to handcuff Deronn Wrather. (App.A, *infra*, 2a).

2. Respondents commenced this action on March 7, 1997, in the United States District Court for the Northern District of Oklahoma. They alleged violation of First, Fourth, Fifth, Thirteenth and Fourteenth Amendment rights. The Fifth and Thirteenth Amendment claims were dismissed on defense motions during the pleading stage of this litigation. At the close of discovery, Petitioner and the other individually named defendants, simultaneously moved for dismissal of the remaining claims on grounds of qualified immunity and summary judgment. (App. A. *infra* 2a-3a).

On October 28, 1999, the district court entered an order granting in part and denying in part these motions. The district court granted Petitioner summary judgment on Respondents' Fourth and Fourteenth Amendment claims, finding no evidence of any constitutional violation. (App.B., *infra*, 13b-20b).

The district court denied Petitioner's request for qualified immunity on Respondents' First Amendment claims. (App.B., *infra*, 5b-7b). The only reason given by the district court for denying qualified immunity to Petitioner was a finding that "[i]t also appears that Sgt. Jim Clark and Sgt. Charles Jordan conferred about the situation with Major W.B. York and they decided to disperse the crowd." (App.B., *infra*, 11b).

3. Petitioner took an interlocutory appeal to the United States Court of Appeals, Tenth Circuit. The Tenth Circuit dismissed this appeal on jurisdictional grounds. (App.A., *infra*, 1a-2a, 6a). Purporting to follow a *Johnson v. Jones*, 515 U.S. 304 (1995) analysis, the appeals court stated:

> Defendants-appellants York and Bonham attempt to cast their arguments as questions of

> law, however, arguing they cannot be held liable because they relied on information provided by other officers in making their decisions. An officer" 'may rely on information furnished by other law enforcement officials to. . .develop probable cause.' " Baptiste v. J.C. Penney Co., 147 F. 3d 1252, 1260 (10th Cir. 1998)(quoting Albright v. Rodriguez, 51 F. 3d 1531, 1536 (10th Cir. 1995)). Qualified Immunity is available, however, only if such reliance was "objectively reasonable." Baptiste, 147 F.3d at 1260. This is a question of fact. (App., *infra*, 5a).
>
> Here, *the record does not show what information was communicated to defendant-appellant York* or to defendant-appellant Bonham. *Without such information, the court cannot presume that the officers acted reasonably* simply because they relied on the observations of other officers. (App., *infra*, 5a-6a). (emphasis added).

REASONS FOR GRANTING THE PETITION

Petitioner recognizes that, in certain circumstances, certiorari may be denied when the facts of the controversy are not sufficiently developed. However, this petition asks the Court to grant certiorari to correct an erroneous decision regarding which party has the burden to develop the facts when the defense of qualified immunity is raised. Specifically, petitioner asks this Court to review a decision of the United States Court of Appeals for the Tenth Circuit which places the

burden upon the defendant in a 42 U.S.C. §1983 case to prove that he or she is entitled to qualified immunity. Petitioner asks this Court to grant the petition to clarify the proper allocation of the burden of proof when a public official raises the defense of qualified immunity and to preserve uniformity of decision among the circuit courts.

I. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER CIRCUIT COURTS IN THAT IT PLACES THE BURDEN UPON A DEFENDANT IN A 42 U.S.C. § 1983 CASE TO PROVE THAT HE IS ENTITLED TO QUALIFIED IMMUNITY.

Petitioner is a supervisor with the Tulsa Police Department. His only connection to the KKK demonstration was that he was the Major in overall charge of crowd control. Petitioner was not present at the scene. The only information he had regarding the situation at the scene was provided to him by Sgt. Jordan and Sgt. Clark, who were at the scene.

The record does not disclose how Sgt. Jordan and Sgt. Clark described the scene to Petitioner. The record merely reflects that Sgt. Jordan and Sgt. Clark conferred with the Petitioner and the decision was made to, in Jordan's words, "attempt to move these people out of the street and allow a clear path for the people to leave and go to their cars on the south side of the street." (ER at 0031).

This was hardly a directive to the officers to engage in unconstitutional conduct. However, the Tenth Circuit effectively held that a defendant in a §1983 case must overcome a presumption that he or she acted unconstitutionally when, after noting the record did not show what information was communicated to Petitioner, it stated "the court cannot presume that the officers acted reasonably" and thereby placed the burden of proving entitlement to qualified immunity upon Petitioner. (App. A, *infra* at 6a).

Following this Court's direction, the general rule of courts of appeal in this country is that the plaintiff has the burden of negating the defendant's qualified immunity defense. *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992). In order to carry his or her burden, a plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). It is the plaintiff's burden to demonstrate how, under the circumstances presented, a reasonable official would understand that his personal conduct violates that right. *Id.*

Once a defendant asserts qualified immunity, the plaintiff bears the burden of proving that the defendant violated a law that was clearly established. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). See also, *Jackson v. Sauls*, 206 F.3d 1156, 1165 (11th Cir. 2000) (holding that the burden of showing that the officers violated clearly established law falls on the plaintiff). The ultimate burden of proof is on the plaintiff to show that the defendant is not entitled to qualified immunity. *Scott v. Clay County*, 205 F.3d 867, 873 n.9 (6th Cir. 2000). See also, *Lowe v. Aldridge*, 958 F.2d 1565, 1570 (11th Cir. 1992) (once a public official has shown that he or she was acting

within the scope of their discretionary duties, the ultimate burden of proof is on the plaintiff to show that the official is not entitled to qualified immunity); and *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988).

The Tenth Circuit's decision in this case is inconsistent with the decisions of this Court and other circuit courts because it literally shifts the burden to the public official asserting qualified immunity to show that he acted reasonably. Prior decisions of this Court and other circuit courts hold the burden of proof is upon the plaintiff to show both facts and law which establish that the defendant is not entitled to qualified immunity. Under the law as announced by this Court and other circuit courts, if after a motion for summary judgment asserting the defense of qualified immunity is fully briefed, the state of the record is such that it is unclear whether the defendant acted reasonably or not, and the question in this regard arises from an absence of evidence rather than conflicting evidence, the plaintiff has not met his or her burden and the defendant is entitled to qualified immunity as a matter of law.

II. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER CIRCUIT COURTS OF APPEAL BECAUSE THE DOCTRINE OF *RESPONDEAT SUPERIOR* CANNOT BE USED TO IMPOSE LIABILITY AGAINST A MUNICIPALITY, OR A SUPERVISOR WHO ASSERTS THE QUALIFIED IMMUNITY DEFENSE.

As noted above, the Tenth Circuit placed the burden on Petitioner to show that he should not face a jury trial with regard to the actions taken by his subordinates. (App. A, *infra*, at 8a-9a). In doing so, the court ruled that Petitioner was responsible for the actions of his subordinates, unless he came forward with evidence which demonstrated that he should not be held liable for what they did. In so doing, the appeals court applied the doctrine of *respondeat superior* to Petitioner, which should not be permitted in a 42 U.S.C. § 1983 action.

The common law principal of *respondeat superior* makes an employer strictly liable, regardless of the presence or absence of fault on the employer' s part, for torts committed by his or her employees in furtherance of his or her business. See, *Rosenthal and Company v. Commodities Future Trading Commission*, 802 F.2d 963, 966 (7th Cir. 1986); *Prosser and Keeton On the Law of Torts*, § 70 (5th ed. 1984).

This Court has specifically held that even if there has been a violation of constitutional law by a subordinate, "`a municipality cannot be held liable under § 1983 on a *respondeat*

superior theory.'"). *Leatherman v. Tarrant County*, 507 U.S. 163, 166 (1993). See also, *Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997) ("a municipality may not be held liable under § 1983 solely because it employs a tortfeasor."). In *Harris v. Greer*, 750 F.3d 618 (7th Cir. 1984) (Posner, J.), the Seventh Circuit noted that "there is no concept of supervisor strict liability under section 1983." The liability of a supervisor cannot be predicated on negligence. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998); *Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

In the present case, Petitioner, who was not at the scene, conferred with Sgt. Jordan and Sgt. Clark and, based upon their description of the situation, presumably authorized them to "attempt to move these people out of the street and allow a clear path for the people to leave and go to their cars on the south side of the street." (ER at 0031). The Tenth Circuit's ruling holds the Petitioner liable for everything that followed, which is an application of the doctrine of *respondeat superior*.

CONCLUSION

Proper application of the qualified immunity defense is an important public issue. The United States Court of Appeals for the Tenth Circuit has acted to deny the full benefits of the qualified immunity defense to public officials within its jurisdiction by improperly shifting the burden of proof to the public officials. The Tenth Circuit's decision in this regard is inconsistent with the decisions of this Honorable Court and the other circuit courts. This petition for a writ of certiorari should be granted to clarify the proper allocation of the burden of proof when a public official raises the defense of qualified immunity

and to preserve uniformity of decision among the circuit courts.

Respectfully submitted,

LARRY V. SIMMONS
Deputy City Attorney
JOHN E. DORMAN
Senior Assistant City Attorney

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